No. 10-1102

In the Supreme Court of the United States

JOSEFA ROSARIO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that, under 8 U.S.C. 1252(a)(2)(B)(i), it lacked jurisdiction to review the Board of Immigration Appeals' determination that petitioner failed to demonstrate that she had been battered or subjected to extreme cruelty by a United-States-citizen spouse, a prerequisite to eligibility for discretionary cancellation of removal under 8 U.S.C. 1229b(b)(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27a-39a) is reported at 627 F.3d 58. The opinions of the Board of Immigration Appeals (Pet. App. 40a-45a) and the immigration judge (Pet. App. 46a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2010. The petition for a writ of certiorari was filed on March 4, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is

found to be removable. 8 U.S.C. 1229b (2006 & Supp. III 2009). The discretion of the Attorney General to grant relief from removal is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted). To obtain cancellation of removal, the alien must demonstrate both that she is statutorily eligible for such relief and that she warrants a favorable exercise of discretion. *See, e.g.*, *Guled* v. *Mukasey*, 515 F.3d 872, 879-880 (8th Cir. 2008). The alien bears the burden of proving her eligibility for cancellation of removal. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d).

As part of the Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902, Congress added a new provision to the cancellation-of-removal statute. *See id.* § 40703, 108 Stat. 1955. As relevant here, that provision provides that the "Attorney General may cancel removal" of an alien if she meets five criteria: (1) she "has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen"; (2) the alien has been physically present in the United States for a continuous period of not less than three years immediately preceding the date of her application; (3) she has been a person of "good moral character" during this period; (4) she is not inadmissible under 8 U.S.C. 1182(a)(2) or (3) (criminal or security grounds), is not deportable under 8 U.S.C. 1227(a)(1)(G) (marriage fraud) or 8 U.S.C. 1227(a)(2) through (4) (criminal grounds, document fraud, and security grounds), and has not been convicted of an aggravated felony; and (5) the removal would result in extreme hardship to the alien, her child, or her parent. 8 U.S.C. 1229b(b)(2)(A).

The statute also provides that when considering an application under this provision "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General." 8 U.S.C. 1229b(b)(2)(D).

b. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-607, Congress removed federal courts' jurisdiction to review certain rulings of the Board of Immigration Appeals. As relevant here, Congress provided that "[n]otwithstanding any other provision of law * * *, no court shall have jurisdiction to review any judgment regarding the granting of relief under section * * * 1229b * * * of this title." 8 U.S.C. 1252(a)(2)(B)(i). As previously noted, Section 1229b of Title 8 addresses cancellation of removal.

Nine years later, in the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, Congress amended that jurisdictional limitation to allow judicial review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D).

2. a. Petitioner is a native and citizen of the Dominican Republic. Pet. App. 28a. In 1994, she was admitted to the United States on a one-month tourist visa. *Id.* at 29a. Petitioner did not timely depart in 1994 but instead unlawfully remained in the United States. *Ibid.*

In 1996, petitioner married Pedro Martinez, a U.S. citizen, who petitioned on her behalf to adjust her status to that of a lawful permanent resident. Pet App. 29a. Soon after Martinez filed the petition, he began to become aggressive and insulting toward petitioner. *Ibid.* Between June 1997 and September 1997, there were approximately five instances of "physical abuse or

intimidation." *Ibid.* (There were no allegations of abuse after that period. *Ibid.*)

During those episodes, "Martinez (variously) grabbed [petitioner] by the arms and shoulders, shook her, verbally insulted her, and threw her on the bed." Pet. App. 29a. He demanded that she give him money and threatened that he would withdraw the petition for her adjustment of status if she failed to give him the money he requested. When petitioner "relented to her husband's demands, he would thereafter leave the house and 'disappear' for a few days." *Id.* at 42a. Petitioner "did not report these incidents to the police or seek medical attention." *Id.* at 29a.

The adjustment-of-status application was not pursued, and it was ultimately denied in 2000. Pet. App. 30a. As a result, in 2002, the Department of Homeland Security issued petitioner a Notice to Appear, initiating removal proceedings against her. *Ibid.* She was charged with being removable as an alien who had remained in the United States longer than permitted after admission as a non-immigrant. *Id.* at 46a-47a; see 8 U.S.C. 1227(a)(1)(B).

b. Appearing before an Immigration Judge (IJ), petitioner admitted the allegations contained in the Notice to Appear and conceded that she was removable as charged. Pet. App. 30a. Seeking relief from removal, petitioner filed an application for cancellation of removal under 8 U.S.C. 1229b(b)(2). Pet. App. 30a. The IJ credited petitioner's testimony but found that it was insufficient to meet her burden of showing that she had been battered or subjected to extreme cruelty by her husband. *Id.* at 50a. The IJ noted that petitioner "never suffered physical harm where she needed hospital treatment or medication." *Id.* at 51a. She never called the

police, and she directed her sister not to call either. *Id.* at 53a. Because an alien must meet each of the statutory requirements of Section 1229b(b)(2)(A), the IJ's determination that she had failed to demonstrate that she had been "battered or subjected to extreme cruelty," 8 U.S.C. 1229b(b)(2)(A)(i)(I), rendered petitioner ineligible for cancellation of removal. Pet. App. 54a.

3. The Board of Immigration Appeals (Board or BIA) affirmed. In the Board's view, the IJ properly found that petitioner had failed to meet her burden of demonstrating that she had been battered or subjected to "extreme cruelty." Pet. App. 42a. Like the IJ, the BIA noted that "she did not suffer any physical harm or injury that required any medical attention." *Ibid.*

The Board recognized that its regulation defining an analogous statutory provision stated that "psychological injury" could result from "extreme cruelty." Pet. App. 42a (citing 8 C.F.R. 204.2(c)(1)(vi)). But the Board pointed out that "the examples of harm listed in the regulation[], such as rape, molestation, incest or forced prostitution, are of a more extreme nature than what [petitioner] has alleged in the instant case, that of her husband's use of offensive language and her uncertainty as to what her husband might do when he returned to the house." *Ibid.*

4. The court of appeals dismissed petitioner's petition for review for lack of jurisdiction. Pet. App. 27a-39a. The court noted that 8 U.S.C. 1252(a)(2)(B)(i) had "stripped the federal courts of jurisdiction to review" BIA decisions not to cancel removal, Pet. App. 31a, while the REAL ID Act of 2005 had "prescribed an exception to the general ban on judicial review of BIA decisions for Circuit Court review of 'constitutional claims or

questions of law.'" *Id.* at 32a (quoting 8 U.S.C. 1252(a)(2)(D)).

The court explained that under this system of limited judicial review, courts can review a BIA determination that "explicitly rests on a legal prescription or statutory interpretation." Pet. App. 33a. At the same time, courts may not review a decision in which "the BIA explicitly finds an alien to be eligible for discretionary relief but then refuses to grant relief as an exercise of its discretion." *Ibid.* In between those two poles, the court of appeals said, were "mixed questions of law and fact," which it concluded were reviewable in three situations:

> (1) Where the BIA applies the wrong statute, misinterprets the correct statute, or uses an erroneous legal standard;
>
> (2) Where the BIA's underlying factual determination is "flawed by an error of law"; and
>
> (3) Where the BIA's conclusion is "without rational justification," meaning it is located so far outside the range of reasonable options that it is erroneous as a matter of law.

Id. at 34a.

The court of appeals concluded that the question whether an alien had been "battered or subjected to extreme cruelty" involved application of law to fact. Pet. App. 37a. The statute states a very general legal standard, the court explained, over the determination whether an alien satisfies it "generally entails a factual judgment, not a legal prescription." *Id.* at 36a. The court found important the fact that Congress did not define "battered" or "extreme cruelty" and that the BIA's regulation construing an analogous statutory provision "contemplates the exercise of considerable discretion in

assessing the totality of the circumstances." *Ibid.* (citing 8 C.F.R. 204.2(c)(1)(vi)).

The court concluded that none of the circumstances in which review of application of law to facts is available was present in this case. Pet. App. 38a. First, the BIA applied the "correct law," 8 U.S.C. 1229b(b)(2)(A)(i), and "the correct legal standard," 8 C.F.R. 204.2(c)(1)(vi). Second, "[t]here were no legal errors underlying any of the factual findings the BIA used to reach its decision." Pet. App. 38a. Third, "given the level of abuse [petitioner] claims to have suffered, it cannot be said that the BIA's conclusion was without rational justification." *Ibid.*

The court concluded that "[u]ltimately, the question whether the abuse [petitioner] suffered qualifies her for cancellation of removal is not answered by legal analysis but entails a weighing of facts and circumstances, the sort of value judgment that lies at the core of the [BIA's] exercise of discretion." Pet. App. 38a. Although the BIA's decision "can be described as an application of law to fact, * * * that characterization cannot convert a factual determination into a legal question" reviewable in the court of appeals. *Id.* at 38a-39a.

ARGUMENT

Petitioner contends (Pet. 7-23) that the court of appeals erred in holding that it lacked jurisdiction to review the Board's determination that she failed to show that she had been "battered or subjected to extreme cruelty." 8 U.S.C. 1229b(b)(2)(A)(i)(I). The court of appeals correctly concluded that petitioner was not asserting a "constitutional claim[] or question[] of law," 8 U.S.C. 1252(a)(2)(D), and that it therefore lacked jurisdiction to review the denial of cancellation of removal.

Although the Ninth Circuit had previously found a claim like petitioner's reviewable, that decision came before statutory amendments altered the scheme of judicial review over such claims. Further review is not warranted.

1. The court of appeals correctly concluded that 8 U.S.C. 1252(a)(2)(B)(i) deprived it of jurisdiction to review the Board's ruling denying petitioner's application for special-rule cancellation of removal. That provision precludes review of "any judgment" regarding the granting of relief under the cancellation of removal provisions in 8 U.S.C. 1229b (2006 & Supp. III 2009). 8 U.S.C. 1252(a)(2)(B)(i). There is a narrow exception to that jurisdictional bar for "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D), but the court of appeals correctly found that exception inapplicable in this case.

Whether an alien has been subjected to "extreme cruelty" by a spouse rendering her eligible for special-rule cancellation under Section 1229b(b)(2)(A)(i) is not a question of law but rather a fact-intensive, discretionary determination. "Determining whether a given course of conduct is 'extremely cruel' involves more than simply plugging facts into a formula." *Perales-Cumpean* v. *Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005); see *id.* at 983 ("There is no hard-and-fast rule to distinguish 'extreme cruelty' from other, less severe, forms of cruel behavior."); *Wilmore* v. *Gonzales*, 455 F.3d 524, 527 (5th Cir. 2006) ("[W]e find that the term 'extreme cruelty' is not self-explanatory."). Instead, "[t]he agency is required to make a judgment whether the cruel conduct alleged is sufficiently extreme to implicate the purposes of the statute." *Perales-Cumpean*, 429 F.3d at 982; see *Stepanovic* v. *Filip*, 554 F.3d 673, 680 (7th Cir. 2009)

("[T]he IJ must determine the facts of a particular case, make a judgment call as to whether those facts constitute cruelty, and, if so, whether the cruelty rises to such a level that it can rightly be described as extreme.").

The BIA has found that a regulation construing an analogous statutory provision illuminates the meaning of battery and extreme cruelty in this context, see Pet. App. 41a-42a, and that regulation is also open-ended and calls for the exercise of fact-intensive discretion. 8 C.F.R. 204.2(c)(1)(vi) ("[T]he phrase 'was battered by or was the subject of extreme cruelty' includes, but is not limited to" specified examples, and "[o]ther abusive actions may also be acts of violence under certain circumstances."); see *Perales-Cumpean*, 429 F.3d at 984 ("[T]his regulation does not provide a binding, objective standard that would channel the BIA's discretion in a manner making it subject to judicial review."); Pet. App. 36a.

The court of appeals' conclusion that it lacked jurisdiction over petitioner's claim is buttressed by a provision specific to the portion of the statute providing eligibility for cancellation of removal for aliens who have been subjected to battery or extreme cruelty. That provision provides that "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the *sole discretion* of the Attorney General." 8 U.S.C. 1229b(b)(2)(D) (emphasis added). In this case, the IJ determined what "weight" to give petitioner's evidence of abuse and concluded that it was insufficient to meet her burden under the statute. As the statute recognizes, that was a determination within his "sole discretion," *ibid.*, and was not a legal determination.

2 The court of appeals' decision is consistent with decisions from the Third, Fifth, Seventh, and Tenth Circuits, all of which have concluded that BIA determinations that particular conduct did not constitute battery or extreme cruelty were not judicially reviewable. See *Johnson* v. *Attorney Gen.*, 602 F.3d 508, 511 (3d Cir. 2010); *Wilmore*, 455 F.3d at 527; *Stepanovic*, 554 F.3d at 679; *Perales-Cumpean*, 429 F.3d at 982; see also *Ramdane* v. *Mukasey*, 296 Fed. Appx. 440, 441-442, 448 (6th Cir. 2008).

In a pre-REAL ID Act of 2005 case, the Ninth Circuit held that the BIA's determination that an alien had not suffered "extreme cruelty" was judicially reviewable, see *Hernandez* v. *Ashcroft*, 345 F.3d 824, 833-835 (2003), but that decision does not directly conflict with the court of appeals' jurisdictional holding here because the judicial review provisions have changed since *Hernandez*. Judicial review in *Hernandez* was governed by the INA's no-longer-operative "transitional rules," which provided that "there shall be no appeal of any *discretionary* decision under section * * * 244 * * * of the Immigration and Nationality Act," *i e* , the provision allowing for suspension of deportation. IIRIRA, § 309(c)(4)(E), 110 Stat. 3009-626, 8 U.S.C. 1101, Note (emphasis added); see *Hernandez*, 345 F.3d at 833.

Given that it was applying that statute, the Ninth Circuit viewed the question of its jurisdiction as turning entirely on "whether the inquiry into whether a [Violence Against Women Act] petitioner suffered 'extreme cruelty' is discretionary or nondiscretionary." *Hernandez*, 345 F.3d at 833. The court concluded that the determination was nondiscretionary (but factual). See *id.* at 834 ("The existence or nonexistence of battery is clearly a factual determination, readily resolved by the

application of a legal standard defining battery to the facts in question."); *ibid.* ("[E]xtreme cruelty involves a question of fact, determined through the application of legal standards.").

As noted previously, the judicial review provisions in the INA have now changed, and they no longer draw a textual line between discretionary and non-discretionary decisions. Instead, the INA currently deprives courts of jurisdiction over "any judgment regarding the granting of" cancellation of removal, 8 U.S.C. 1252(a)(2)(B)(i), while creating an exception only for "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D).

Recognizing this change, the court of appeals in this case noted that jurisdiction in this context had been articulated in "two ways." Pet. App. 32a. The court of appeals first noted that, based on this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), the Second Circuit had previously said (like the Ninth Circuit in *Hernandez*) that it "could review those 'nondiscretionary decisions' by the BIA that underlie its exercise of discretion in granting or denying cancellation of removal." Pet. App. 32a (quoting *Rodriguez* v. *Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006)). Yet "[l]ater, based on the REAL ID Act," the court of appeals noted that it had said its review was limited to "'constitutional claims or questions of law' raised by the BIA's exercise of its discretion." *Id.* at 32a-33a (quoting *Argueta* v. *Holder*, 617 F.3d 109, 112 (2d Cir. 2010) (per curiam)).

For purposes of this case, the court of appeals viewed these two standards as "congruent," Pet. App. 33a, and it would have found no jurisdiction under either one, compare *id.* at 36a (question "entails a factual judgment, not a legal prescription") with *id.* at 38a (BIA decision

involved "the sort of value judgment that lies at the core of the BIA's exercise of discretion").

The Ninth Circuit, however, has not revisited its jurisdictional holding in *Hernandez* in light of the changes to the judicial review provisions of the INA or said that it would view the jurisdictional inquiry under both approaches as the same in this context.[1] In particular, the Ninth Circuit has not addressed the question whether the BIA's determination that an alien failed to establish that she was subjected to "battery" or "extreme cruelty"—determinations the court in *Hernandez* deemed "question[s] of fact" (345 F.3d at 834)—are reviewable under a statutory scheme that permits judicial review only of "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D).

At least unless and until the Ninth Circuit expressly revisits its jurisdictional holding in *Hernandez* in light of the subsequent changes to the judicial review statutes, any conflict between it and the other courts of appeals is not ripe for resolution by this Court.[2]

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[1] In *Lopez Birrueta* v. *Holder*, 633 F.3d 1211 (2011), the Ninth Circuit reviewed a BIA determination that an alien's children had not been "battered" or "subjected to 'extreme cruelty.'" *Id.* at 1213-1214. The court, however, did not address its jurisdiction and, in any event, granted the petition for review based on "several errors in [the BIA's] *legal* analysis." *Id.* at 1216 (emphasis added).

[2] The court of appeals in *Hernandez* also did not consider former 8 U.S.C. 1254(g) (1994), which, like current Section 1229b(b)(2)(D), committed the determination of the weight and credibility of the evidence regarding the determination of extreme cruelty or battering "to the sole discretion of the Attorney General." Any conflict between the Ninth Circuit and the other courts of appeals would likewise not be ripe until the Ninth Circuit addressed that provision in the context of concluding that it had jurisdiction.

3. Finally, this case would make a poor vehicle for consideration of the jurisdictional question presented because petitioner would not have prevailed on the merits even if the court of appeals had concluded that it could review her claim.

The BIA correctly concluded that the five incidents petitioner alleged in 1997 did not amount to "battery" or "extreme cruelty." Pet. App. 42a. Although petitioner's husband "shook her, pushed her and used bad words in the process of demanding money from her," she "did not suffer any physical harm or injury that required any medical attention," and she failed to establish any significant "psychological impact" from her husband's conduct. *Id.* at 42a-43a. Moreover, after petitioner's husband was released from jail in 2000 (for offenses unrelated to petitioner), he did not repeat this conduct or engage in any other alleged abuse. *Id.* at 29a. Especially given that questions of the "weight" of evidence of are in the "sole discretion" of the BIA, 8 U.S.C. 1229b(b)(2)(D), petitioner would be unable to show that the BIA erred in concluding that she was not subjected to "*extreme* cruelty," 8 U.S.C. 1229b(b)(2)(A)(i)(I).[3]

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[3] Even if petitioner were successful in establishing that she was subjected to "extreme cruelty," she would also have to establish that she satisfied the "extreme hardship" requirement for special-rule cancellation of removal, a question the BIA found it unnecessary to reach. Pet. App. 43a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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